

## POPULATION CONTROL IN THE YEAR 2000—THE CONSTITUTIONALITY OF PLACING ANTI-FERTILITY AGENTS IN THE WATER SUPPLY

A major reorientation in the thinking of the American people will have to occur in the area of population control if the United States is going to avoid the plague of overpopulation predicted by Malthus almost two hundred years ago. Unfortunately, we are presently in a state of slumber which, if continued, will mean that as many as 365 million Americans will be welcoming in the next century.<sup>1</sup> The size of the problem may not seem prodigious at first glance, but closer scrutiny will reveal that the situation in this country may be more dire than even in India.<sup>2</sup> A sniff of the New York air or a swim in Lake Erie should be sufficient to cause one to wonder whether we will even survive the next thirty years.

The average American today is as great a demon to his environment as is the man-created chemical DDT.<sup>3</sup> And this demon is growing at the rate of 1% a year, a rate that will double our population in seventy years.<sup>4</sup> To put it in more melodramatic terms, a 1% growth rate over the last five-thousand years would have produced a contemporary population of 2.7 billion persons for each square foot of land.<sup>5</sup>

One year's crop of infants can be expected to use 200 million pounds of steel, 25 billion pounds of beef, and 9.1 billion gallons of gasoline during their lifetime. For every increment of 1,000 Americans, we will require 36.5 million gallons of water per year and enough sewers and treatment plants to handle an additional 62,000 pounds of organic water pollutants per year.<sup>6</sup>

To make matters worse, the present population is destroying the land at a rate of over a million acres a year. "We now [1970] have only 2.6 agricultural acres per person. By 1975 this will be cut to 2.2, the critical point for the maintenance of what we consider a decent diet, and by the year 2000 we might expect to have 1.2."<sup>7</sup> We must choose one or both of two

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<sup>1</sup> W. PETERSON, *POPULATION* 265 (2d ed. 1962).

<sup>2</sup> W. Davis, *Overpopulated America*, New Republic, Jan. 10, 1970, at 13-14 [Hereinafter cited as W. Davis].

<sup>3</sup> See, *Id.* at 14.

An American . . . can be expected to destroy land on which he builds a home, garage, and driveway. He will contribute his share to the 142 million tons of smoke and fumes, seven million junked cars, 20 million tons of paper, 48 billion cans, and 26 billion bottles which the overburdened environment must absorb each year. To run his air-conditioner, he will stripmine a Kentucky hillside, push the dirt slate down into the stream and burn coal in a power generator, whose smokestack contributes to a plume of smoke massive enough to cause cloud seeding and premature precipitation from Gulf winds which should be irrigating the wheat farms of Minnesota.

<sup>4</sup> Lamm, *The Reproduction Revolution*, 56 A.B.A.J. 41, 42 (1970).

<sup>5</sup> W. Davis, *supra* note 2 at 14.

<sup>6</sup> CONSERVATION FOUNDATION NEWSLETTER, April 30, 1967, at 2.

<sup>7</sup> W. Davis, *supra* note 2, at 14.

options if we are going to solve our population dilemma—we can either lower the birth rate or raise the death rate.

The population problem of this country is not confined to our geographical parameters. With the world's population rate double ours, this means the other countries will soon be making more and more demands on our surplus food supply. A world that is projected to contain seven billion people in the year 2000<sup>8</sup> may require the United States to radically decrease its consumption of the world's goods. Famine conditions in the world may demand that this country reexamine its traditional notion of national sovereignty, the right of its people to the exclusive domain of the resources within its border.

Famine and pollution are not the only deleterious consequences that flow from overpopulation. In addition, the United States will find it necessary to alter the ways in which its citizens relate.

Under conditions of such high density, human behavior of all kinds would have to be rigidly controlled. Spontaneity could not be permitted; individual variation would have to be virtually nil. What is at stake here is no less than the survival of human society as we know it.<sup>9</sup>

Thus, not only may our children be hungry and their environment filthy, but they may find it necessary to institute totalitarian controls in order to keep the society "smoothly" functioning.

### *What has been done*

Family planning is one of the most palatable plans offered so far in an attempt to hold our population growth to bearable proportions. But for the same reasons that it is palatable it is also futile. Family planning is another way of saying contraception. The family planning method is to supply new, more efficient contraceptive devices to our adult population. In this way it is hoped that we will be able to lower our birth rate to supportable proportions. A significant feature of such stated goals is the rapid population growth it will allow. Unless the population growth rate is reduced to zero, our population will continue to rise towards oblivion.

The family planning technique is aimed at each individual family. The unsoundness of such a method of population control becomes manifestly apparent when viewed from the national scale.

Logically, it does not make sense to use family planning to provide national population control or planning. The 'planning' in family planning is that of each separate couple. The only control they exercise is control over the size of their family. Obviously, couples do not plan the size of the nation's population anymore than they plan the growth of the na-

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<sup>8</sup> TIME, Feb. 7, 1970, at 59.

<sup>9</sup> A. Day, *Population and Personal Freedom*, 28 HUMANIST 7 (1968).

tional income or the form of the highway network. There is no reason to believe that the millions of decisions about family size made by couples in their own interest will automatically control population for the benefit of society.<sup>10</sup>

The advocates of family planning have stated again and again that its aim is to allow the family to have as many children as it desires. It is more concerned with spacing than it is with lowering the birth rate. Since the average family in this country desires 3.3 children,<sup>11</sup> it is unlikely that contraceptives will provide a viable solution. Even if our new contraceptives work perfectly, they will not prevent the typical family from having its 3.3 children. The voluntariness of the program dooms it to failure.

We thus see that the inadequacy of current population policies with the respect to motivation is inherent in their overwhelming family-planning character. Since family planning is by definition private planning, it eschews any societal control over motivations. It merely furnishes the means, and among possible means, only the most respectable.<sup>12</sup>

In reality, the family planning program does more harm than good. Reliance on family planning enables people to feel that something is being done about the problem when, in fact, very little is actually being achieved. Family planning allows people to ignore the need for those painful changes that must be instituted if this country—and for that matter this world—is going to survive.

That the exclusive emphasis on family planning in current population policies is not a 'first-step' but an escape from the real issues is suggested by two facts. (i) No country has taken the 'next step.' The industrial countries have had family planning for half a century without acquiring control over either the birth rate or population increases. (ii) Support and encouragement of research on population policy other than family planning is negligible. It is precisely this blocking of alternative thinking and experimentations that makes the emphasis on family planning a major obstacle to population control.<sup>13</sup>

The possibility of a starving world is something that can no longer be ignored; and family planning is to ignore that possibility. If we are going to overcome our environmental shortcomings, it is incumbent that this country institute more advanced solutions. As Kingsley Davis has observed,

Changes basic enough to affect motivation for having children would be changes in the structure of the family, in the position of the women, and in sexual mores. Far from proposing such radicalism, spokesmen for fam-

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<sup>10</sup> K. Davis, *Population Policy: Will Present Policies Succeed?* SCIENCE Nov. 11, 1967, at 732.

<sup>11</sup> W. Davis, *supra* note 2, at 15.

<sup>12</sup> K. Davis, *supra* note 10, at 734.

<sup>13</sup> *Id.* at 737.

ily planning frequently state their purpose as 'protection' of the family—that is, closer observance of family norms.<sup>14</sup>

What is needed is a fertility control device that is involuntary in nature so as not to suffer from the basic drawbacks of family planning. It should be such that it can be easily taken by the entire populace. The method should be harmless, and its effects must be reversible in case it is found to be deleterious to the health of the society as a whole such as lowering the population growth too radically. It should be inexpensive. In addition, it should not interfere with the sexual activities of the persons affected. And, of course, it should be constitutional.

One proposal that manifests promise is to add anti-fertility agents to the water supply. Doses of the antidote would be carefully rationed by the government to produce the desired population result. Such an agent would be as simple to include in the drinking supply as fluoride. While such an agent has not yet been developed, many scientists believe that it could be produced in the foreseeable future.<sup>15</sup> If the United States were to take the initiative in employing this type of population control, it would then be easier for us to convince the rest of the world that drastic population control is urgently needed. Such an American program would alleviate the fear that we were trying to weaken the rest of the world's population power base by lowering its population rate.

### *The Griswold Doctrine*

*Griswold v. Connecticut*,<sup>16</sup> decided by a 7-2 majority, ruled unconstitutional a Connecticut criminal statute which prohibited the use of contraceptive devices by married couples. The case set aside the conviction of the Executive Director of the Planned Parenthood League of Connecticut who had "aided and abetted" a married couple in the use of contraceptives. The unanticipated result of this case was the erection of a major constitutional barrier to state action designed to regulate propagation.

Mr. Justice Douglas writing for the majority stated that there are certain fundamental constitutional guarantees that are not specifically enumerated in the Bill of Rights but are penumbras of such rights. These penumbras are emanations from those specific guarantees that help to give them substance. The basis of Douglas' argument is that there are "zones of privacy" created by the various rights found in the Bill of Rights.

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, . . . . The Third Amendment in its prohibition against the quartering of soldiers 'in

<sup>14</sup> *Id.* at 734.

<sup>15</sup> M. Ketchel, *Fertility Control Agents as a Passive Solution to the World Population Problem*, Perspectives in Biological Medicine.

<sup>16</sup> 381 U.S. 479 (1965).

any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.<sup>17</sup>

*Griswold*, he goes on to say, concerns a situation which falls within the constitutionally protected zone of privacy.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. . . . [I]t is an association for as noble a purpose as any involved in our prior decisions.<sup>18</sup>

The Court held one has a right to privacy in one's marital relations that is protected by the "zone of privacy" created by the Bill of Rights. Since the Connecticut statute attempted to invade that protected zone, it was therefore unconstitutional.

While the *Griswold* doctrine grants greater freedom to people in their private relations, it is also a major deterrent against governmental action that may attempt to regulate such behavior for the good of the community. A question that is presented is whether state or federal action that is designed to limit a couple's right to bear children via anti-fertility agents placed in the water supply is constitutional in terms of *Griswold*. A clue to the answer is to be found in the concurring opinions.

The three concurring opinions were written by Justices Goldberg, Harlan, and White. Mr. Justice Goldberg in his opinion states:

Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment incorporates all of the first eight Amendments . . . I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported by numerous decisions . . . .<sup>19</sup>

Goldberg then narrows in on the question of government regulation of the marital relation.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.'<sup>20</sup>

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<sup>17</sup> *Id.* at 484.

<sup>18</sup> *Id.* at 486.

<sup>19</sup> *Id.* at 486-87.

<sup>20</sup> *Id.* at 497.

Goldberg further states, "Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them."<sup>21</sup>

White, in his concurrence, reinforces the notions enunciated by Goldberg. He believes that statutes designed to limit the right of privacy in marriage "if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause."<sup>22</sup> Thus, it appears that while privacy in marital relations is a fundamental right protected by the Constitution, it may still be amenable to government regulation when a compelling state interest is shown. If present population trends continue—and there is no reason that they should not—a compelling state interest will indeed exist at that junction in the future when anti-fertility agents are a viable means of birth control. That state interest may involve our very existence.

### *Free exercise of religion*

The religious issue presented is whether the government may require persons residing in the United States be subject to birth control regulation even though their religious convictions run contrary to such a policy. By placing anti-fertility agents in the water supply, the government is enforcing its birth control measures against all members of this country without regard to the dictates of their religion. One of the earliest cases addressing itself to this basic issue was *Jacobson v. Massachusetts*.<sup>23</sup> In this case Jacobson refused to allow himself to receive a smallpox vaccination in accordance with state and local law requiring such. The Court would not sustain his refusal stating that: "[A]ccording to settled principles the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."<sup>24</sup>

Two recent decisions by the Supreme Court bear directly on the problem at hand. The first of these, *Braunfeld v. Brown*,<sup>25</sup> concerned the constitutional validity of a Pennsylvania criminal statute which proscribes the Sunday retail sale of certain commodities. Appellants were merchants who engaged in the retail sale of clothing and home furnishings, both items being within the proscription of the statute. Each of the appellants were members of the Orthodox Jewish faith, which requires its members to abstain from work from nightfall each Friday until nightfall on each Sat-

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<sup>21</sup> *Id.* at 496-97.

<sup>22</sup> *Id.* at 504.

<sup>23</sup> 197 U.S. 11 (1905).

<sup>24</sup> *Id.* at 25.

<sup>25</sup> 366 U.S. 599 (1961).

urday. Appellants sought an injunction against the enforcement of the Pennsylvania statute. Each of them claimed that they had done a substantial amount of business on Sunday and that loss of such business would lead to economic ruin.

The appellants argued that the enforcement of the Pennsylvania statute would deny them the free exercise of their religion since, due to the statutes compulsion that their businesses be closed on Sunday, appellants will suffer economic loss, to the advantage of their non-Sabbatarian competitors, if the appellants continue their observance of Saturday. This result will either compel appellants to forego their Sabbath observance, or put them at a serious competitive disadvantage if they continue to adhere to their religious beliefs. Such a result they claim would be a violation of the first amendment's free exercise clause since their religion is being subject to discriminatory treatment by the state.

The Supreme Court disagreed with the appellants argument.

[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. [L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.<sup>26</sup>

The Court then enunciated the ruling in the case.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.<sup>27</sup>

A similar view was advocated in *Sherbert v. Verner*.<sup>28</sup> Appellant was a member of the Seventh-Day Adventist Church, who was discharged by her employer because she refused to work on Saturday, the day of her Sabbath. When she was unable to find other employment because of her devotion to her religion concerning its ban on work during the Sabbath, the appellant applied for unemployment compensation in accordance with the South Carolina statute. The appellee Employment Security Commission refused appellant's request on grounds that her self-imposed restriction upon working on the Sabbath brought her within the provisions of the stat-

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<sup>26</sup> *Id.* at 603-04.

<sup>27</sup> *Id.* at 607.

<sup>28</sup> 374 U.S. 398.

ute disqualifying her for benefits. The provision refused unemployment benefits to those insured workers who fail, "without good cause, . . . to accept available suitable work when offered by the employment office or the employer . . . ." <sup>29</sup> Appellant appealed, claiming a denial of her free exercise of religion.

The Court sustained appellant's claim, distinguishing *Braunfeld* on the grounds that in that case there was a showing of a compelling state interest while in this case there was no such showing.

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown* . . . . The statute was . . . saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers.<sup>30</sup>

These cases support the proposition that the state is free to exercise its legislative power to institute birth control provided its interest is compelling, the means chosen are reasonable, and the nature of the legislation is secular in purpose. If the state's right to declare Sunday a day of rest is constitutional, then the use of anti-fertility agents to effectuate birth control is constitutional *a fortiori*.

### *The Equal Protection Clause*

We have already ascertained that the state can regulate provided it can show a compelling state interest. The problem that develops in the equal protection area arises once the government decrees that the antidote (to the anti-fertility agent) shall be distributed on some basis other than one man—one antidote. For the sake of this discussion, I shall decree the governmental policy to be that only those married couples whose I.Q's (assuming a fairly accurate test by the year 2000) are above a given point (X) shall be administered the antidote. One of the considerations the legislature made in choosing X is that it is the point at which population growth shall be maintained. The overriding policy consideration was that due to a highly complex society; the country required a larger supply of people, and that such a policy would facilitate this desired end (assume again that scientific evidence discloses that those people with I.Q's of X or higher propagate more intelligent offspring than does the population as a whole and this is the least costly method). In order to ascertain whether the equal protection clause has been violated by such a law, one must first determine the meaning of equal protection. The essence of the doctrine is that those who are similarly situated must be treated in a similar fashion. "[W]hat the equal protection of the law requires is equality of burdens upon those in like situation

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<sup>29</sup> *Id.* at 401.

<sup>30</sup> *Id.* at 408.



or condition."<sup>31</sup> Conversely, those things that are different in fact need not be treated as if they were the same. "[T]he equal protection clause does not forbid discrimination with respect to things that are different."<sup>32</sup>

The nature of the problem lies in determining the test of equal protection. What the equal protection clause outlaws are classifications which are irrational in that they treat those in similar situations in dissimilar fashion. For a legislative classification to be constitutional, it must at least manifest a reasonable (rational) relation between the classification and the purpose of the legislation. Thus, in *Skinner v. Oklahoma*,<sup>33</sup> the Court ruled Oklahoma's Habitual Criminal Sterilization Act a violation of equal protection. The statute provided for the compulsory sterilization of those persons who have been "convicted two or more times for crimes amounting to felonies involving moral turpitude . . . ."<sup>34</sup> The statute excluded from its dictates "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offense . . . ."<sup>35</sup> In ruling the act unconstitutional, the Court said:

When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins*. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination.<sup>36</sup>

The Court went on to say:

We have not the slightest basis for inferring that that line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked . . . . In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different.<sup>37</sup>

The Court in *Skinner* ruled the Act irrational since the classification was underinclusive. The Court did not, however, outlaw all classifications that clashed with personal rights. Mr. Chief Justice Stone, in his concurrence, referred to the point. "Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies."<sup>38</sup>

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<sup>31</sup> State of South Carolina *ex rel.* Phoenix Mut. Life Ins. Co. v. McMaster, 237 U.S. 619, 624 (1934).

<sup>32</sup> Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619, 624 (1934).

<sup>33</sup> 316 U.S. 535 (1942).

<sup>34</sup> *Id.* at 536.

<sup>35</sup> *Id.* at 537.

<sup>36</sup> *Id.* at 541.

<sup>37</sup> *Id.* at 542.

<sup>38</sup> *Id.* at 544.

Another kind of classification that gives rise to a somewhat more stringent equal protection test is that which is made on the basis of race, religion, or some other sensitive criteria. The rational relation test is still involved, yet in instances of such a classification the Court will examine the classification with very close scrutiny. Mr. Justice Black, speaking for the Court in *Korematsu v. United States*<sup>39</sup> made this point explicit. "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."<sup>40</sup> In this second category of classifications, the Court is most concerned with the legislative purpose in enacting the legislature. Black, speaking again in *Korematsu* states that this is so:

Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . *Korematsu* was not excluded from the Military Area because of hostility for him or his race. He was excluded because we are at war with the Japanese Empire . . .<sup>41</sup>

In *Takahashi v. Fish and Game Commission*,<sup>42</sup> the Court struck down a California law which barred aliens from commercial fishing privileges in the coastal waters. The Court said that such a classification was a violation of equal protection whether its purpose was "to conserve fish in the California coastal waters, or to protect California citizens engaged in commercial fishing from competition by Japanese aliens, or for both reasons."<sup>43</sup> The first purpose is a violation of equal protection since the classification is not rationally related to the legitimate purpose of the legislature. Even considering that there is a rational relation to the second purpose, the statute still suffers because that purpose is invalid.

What follows from this analysis is that a classification that is related to a legislative purpose is not enough. The equal protection clause has an additional test. The purpose must be constitutionally legitimate. In order to determine whether the legislative purpose is valid, one must first understand the role of the equal protection clause.

One does not have a constitutional right to equality in and of itself. One has the right to equality for a purpose, the purpose being a constitutionally protected privilege. What the equal protection clause actually protects is the right of a person to have equal access to that privilege. The classification and the right infringed upon by the classification are too inextricably woven to allow one to simply inquire into the reasonableness of the former without paying cognizance to the latter. The importance of

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<sup>39</sup> 323 U.S. 214 (1944).

<sup>40</sup> *Id.* at 216.

<sup>41</sup> *Id.* at 223.

<sup>42</sup> 334 U.S. 410 (1948).

<sup>43</sup> *Id.* at 418.

equality is contingent on the salience of the right involved. And if that right is a fundamental one, then the test of equal protection is no longer rational relation but rather compelling state interest. Since the problem we are concerned with in this article involves a *Griswold* right, the equal protection clause will require not merely a national legislative purpose but rather a compelling purpose if the classification for the determination of distributing the antidote be deemed constitutional.<sup>44</sup>

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<sup>44</sup> It must be pointed out that the use of anti-fertility agents can be subject to dangerous abuse and should only be employed under the strictest of regulatory supervision.